

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



74-1173

Docket No. 74-1173

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P/S

IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT

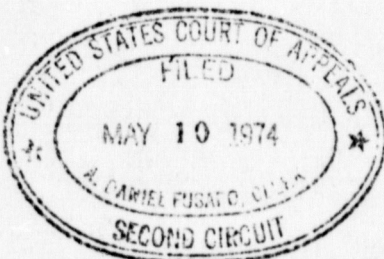
DELPHINE E. PLOURDE,  
Plaintiff-Appellee

VS.

SHERBURNE CORPORATION,  
Defendant-Appellant

Appeal from the United States District Court  
for the District of Vermont  
Honorable James S. Holden, Chief U.S.D.J.

BRIEF OF DEFENDANT-APPELLANT



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## ISSUES

- I. Did the Court err in failing to set aside the verdict and judgment and enter judgment for the Defendant because of:
  1. Failure of the Plaintiff to prove that her injury was caused by negligence of the Defendant or
  2. Assumption of the risk by the Plaintiff?

## STATEMENT OF THE CASE

This is a civil action in the United States District Court for the District of Vermont based on diversity and commenced by Complaint of Delphine E. Plourde dated October 2, 1972, in which the Plaintiff seeks to recover damages for alleged personal injury claimed to have been sustained in a fall on January 21, 1972 while skiing at premises provided by the Defendant, Sherburne Corporation.

The case was tried on December 11-18-20, 1973 before the Honorable James S. Holden, Chief United States District Judge, and a jury at Rutland, Vermont. Defendant's Motions for a directed verdict were denied. Verdict was for the Plaintiff. Defendant moved to set aside the verdict and judgment. The Motion was denied and Defendant appeals.

### STATEMENT OF FACTS

The accident happened on January 21, 1972 at the Snow Shed Ski Area provided by the Defendant Corporation at Killington, Vermont. Plaintiff, Delphine E. Plourde, then 23 years of age, lived at East Hartford, Connecticut, and she had come to Killington, Vermont with a friend, Bob Heimrich, to stay at the Corsair Club Lodge and take advantage of a package deal whereby the Defendant Sherburne Corporation offered the use of their ski lifts and ski lessons for a period of a week. (Tr. 25-35) Lessons began on Monday, January 17, 1972. There were eight in Miss Plourde's class. The class would meet each day at noon at the foot of the Snow Shed Ski Area. (Tr. 47, 48, 50) After the lessons the Plaintiff practiced alone. (Tr. 40)

Plaintiff's Exhibit No. 22 is entitled "Killington Ski School Manual". It gives the policy and objectives of the Ski School and instructions to instructors. On Page 33 thereof there is a caption "D Liability" and the following:

"The instructor must exercise extreme care for his students and under no circumstances will students be exposed to hazardous conditions, excessive speed and the like. Never dismiss students or leave a student on the trail or slope."

The Plaintiff testified that on Friday, January 21, 1972 the lesson began at noon with the same instructor she had had previously, but from the Snow Shed Area they were taken to a different trail and then returned to the Snow Shed Area. Plaintiff testified that upon returning to the upper part of the Snow Shed Area with a class of eight her instructor said that he was late for his next class which was forming at the base, that the class should get down the slope any way they could, that he would see them the next day at the same time at the bottom of the Snow Shed and that the class was to practice as much as they could in the afternoon, and whereupon the instructor skied down. The Plaintiff testified that less than a minute after the instructor left, (they always skied down the mountain individually, not as a group) the Plaintiff's skis started to pick up speed and she was turning left when

she fell. When she fell she heard something tear and felt pain in her right knee. (Tr. 47-53)

The foregoing is only the Plaintiff's version of the facts but it is upon this outline that she bases her claim that the Defendant Sherburne Corporation's ski instructor was negligent and that said negligence was the proximate cause of her fall and injury. (Tr. 212-215) A claim that Plaintiff's ski bindings failed to release and that said failure caused her injury was dismissed by the Court for lack of evidence. (Tr. 316, 322)

## ARGUMENT

### I. THE PLAINTIFF FAILED TO PROVE CAUSATION.

A. There was no evidence that negligence caused the injury.

Assuming, but not admitting, that the ski instructor for the Defendant Sherburne Corporation was negligent in dismissing his class at the upper part of the Snow Shed Ski Area rather than at the bottom, nevertheless, there is no evidence that the claimed negligence caused the injury.

In McDonald vs. Montgomery Ward, 121 Vt. 221, 229, 154 A.2d 469, 475 (1959), the Plaintiff was burned by a gas explosion in her oven. There was testimony that the thermostat in the gas range was defective, but there was no evidence as to how it was defective, that it leaked or that it contributed to the dangerous accumulation of gas that finally burst into flame. Verdict and judgment was for the Plaintiff, but on appeal, the Court reversed, saying:

"Without evidence, direct or circumstantial, that the defective thermostat was a procuring factor in the release of the explosive gas, the requisite causal connection between neglect and injury is wanting. Liability for negligence is not established until the fact of injury is traced and connected to an act or agency that is the defendant's responsibility."

In Perkins vs. Vermont Hydro-Electric Corp., 106 Vt. 367, 380, 381, 177 A. 631, 637 (1934) the Court said that the principle involved is simply that of causation. A Defendant's tort cannot be considered the legal cause of Plaintiff's damage, if that damage would have occurred just the same even though the Defendant's tort had never been committed. The Court further said:

"All this, however, is only stating in other words the rule that, in order to justify a recovery, the defendant's negligence must form, what is equally called a proximate

cause, but which may more accurately be termed an efficient and producing cause of the injury." Professor Beale expressed the principle in this way:

"Where the act is the failure merely of a legal duty, causation is established only when the doing of the act would have prevented the result; if the result would have happened just as it did whether the alleged actor had done his duty or not the failure to perform the duty was not a factor in the result, or, in other words, did not cause it."

The Proximate Consequences of an Act, 33 Harv. L. Rev. 633, 637 (1920)

It is a rule of Vermont law that though one is negligent such negligence is not the cause of the injury in the legal sense if the injury would have occurred just the same if there had been no negligence in the respect claimed.

Paquin vs. St. Johnsbury Trucking Company, Inc., 116 Vt. 466, 473, 78 A.2d 683, 687 (1951).

The Plaintiff fell on the upper part of the Snow Shed Ski Area but the fall and the injury was in no way related to the presence or absence of the ski instructor.

Falls are fairly common things and practically everyone who skis, falls. It is one of the dangers of skiing and it is a major danger. (Tr. 145) Prior to the accident the Plaintiff had been in excellent health and had engaged in swimming, bike riding, hiking, camping, tennis, water skiing, bowling, horseback riding but she had never done any snow skiing until the end of 1971. (Tr. 27, 28) On Monday morning, January 27, 1972 she reported for skiing at the Killington Area and was issued boots and skis. (Tr. 35, 36, 37) The plan of instruction for beginners was to start with short skis because they are easier to handle and to work up to longer ones. (Tr. 31, 104) The Plaintiff went to the base of Snow Shed Area, a novice area (Tr. 105), and was assigned an instructor. There were a hundred or over two hundred skiers seeking (Tr. 38) instructions. She was told that they would

use the graduated length method and she was given skis about three or four feet in length and these were to be used three days, through Wednesday. (Tr. 39, 40) During the first three days Plaintiff stayed at the Snow Shed Area but after her lessons she was allowed to practice alone. (Tr. 40) She learned to ride the ski lift but she was not issued ski poles. (Tr. 35, 41)

On Thursday the Plaintiff was issued longer skis, five feet. (Tr. 41) During the first three days the Plaintiff and the other members of her class had fallen. (Tr. 41, 43) On Thursday during the course of her lesson the Plaintiff fell. (Tr. 44) On Friday morning the Plaintiff left the Snow Shed Area and went by automobile on her own initiative, without her instructor, to another area where there was a gondola lift and practiced skiing. (Tr. 45) The gondola area was basically novice. (Tr. 105) She met other members of the class at the gondola lift and took the gondola half way up and skied back down. Part of the gondola trails were difficult. Again, the Plaintiff fell but skied to the bottom and drove back by car to the Killington area to be ready for

her customary noon lesson at Snow Shed. (Tr. 44-47)

Before the lesson on Friday the Plaintiff was given ski poles (Tr. 45, 47) and instructed how to hold them. Then the instructor took the class to a different area. They took the lift up the Snow Shed and then took one of the trails from the Snow Shed to the gondola area which was a trail that Plaintiff had not been on before. (Tr. 49) The instructor would lead the way so many feet and stop, the instructor would go 20, 25 or 30 feet then he would stop and call to the members of the class individually by name to ski to him. (Tr. 49) There were eight in the class. (Tr. 50) The instructor gave the class instructions about holding the poles and the class eventually reached the top of the Snow Shed Area from the gondola area. The Plaintiff was tired. She had fallen several times on the way down. (Tr. 51) The Plaintiff testified that having reached somewhere in the general area of the top of the Snow Shed where the previous lessons had been conducted and where she had previously practiced alone, the instructor said he was late for his next class and that he would see the class the next day at

the same time at the bottom of the Snow Shed and for them to practice as much as they could in the afternoon after which he left and skied down. (Tr. 52) The Plaintiff testified that less than a minute after the instructor left "\* \* I was going down the mountain and my skis started to pick up speed and I tried to maneuver myself but I just didn't know what to do with the poles or how to get out of the speed that I was picking up and I was turning left going down the Snow Shed and I fell". (Tr. 52, 53) The Plaintiff heard something tear and could not get up and had pain in her right knee. (Tr. 53) Later the Plaintiff testified "Well, I was riding about my poles. I didn't know what to do with them and I didn't know how to stop picking up speed". (Tr. 92)

It is evident from the foregoing that the presence or the absence of the instructor had no connection with the fall and injury. The Plaintiff had fallen before while skiing in class and while skiing alone. The Plaintiff had fallen before in class while using the five foot skis. (Tr. 44)

There is no evidence that while class was in progress the instructor had any physical contact with the students so as to assist them physically to prevent them from falling. There is no evidence as to what, if anything, at any time the instructor could do to prevent anyone from falling. Given the Plaintiff's description of her fall (Tr. 52, 53) there is no evidence as to what, if anything, she was doing wrong. Assuming that the Plaintiff was doing something wrong, there is no evidence as to what, if anything, the instructor could have said to cause her to correct it. The Plaintiff was tired. She had been to a new ski area, the gondola area, in the morning of her own accord without the instructor. (All skiers fall sometime and it is one of the major hazards of skiing). There was a total failure of the evidence to connect the absence of the ski instructor to the injury.

The Plaintiff lost control of her skis and was trying to regain control. (Tr. 91, 92) The Plaintiff fell during her lessons. (Tr. 97) On Thursday she had skied a half hour after the lesson and fell while skiing alone. (Tr. 98) She fell a number of times during the lesson on Friday. (Tr. 98, 99).

B. Burden of Proof.

The burden of showing that the Defendant was guilty of some act or omission that proximately caused the accident is on the Plaintiff. Lewis vs. Vermont Gas Corp., 121 Vt. 168, 179, 151 A.2d 297, 304 (1969). Even if negligence is shown, it remains for the Plaintiff to establish the fact that some legal injury resulted to her as a proximate consequence of such act or omission. Humphrey vs. Twin State Gas & Elec. Co., 100 Vt. 414, 422, 139 A. 440, 444 (1927)

C. The Trial Court Allowed the Jury to Speculate.

If there was any evidence that the absence of the ski instructor was in any way causally connected with the Plaintiff's fall, which is denied, such evidence was not of sufficient quantum or character for the Trial Court to submit the case to the jury. Although on a motion for directed verdict, the evidence must be considered in the light most favorable to the Plaintiff, the Court must not submit a case to the jury where a verdict would be based on speculation or surmise. In Peterson vs. Post, 119 Vt. 445, 451, 128 A.2d 668,

671 (1957), the Court said:

"But, on the other hand, the evidence supporting the claim must be more than a scintilla. The question is not merely whether there is any evidence to this effect, but whether it is of such a quality and character as to justify a jury, acting reasonably, to predicate a verdict thereon in favor of the party having the burden of proof. Evidence which merely makes it possible for the fact in issue to be as alleged, or which raises a mere conjecture, surmise, or suspicion, is an insufficient foundation for a verdict.

Perkins vs. Vermont Hydro-Electric Corp., 106 Vt. 367, 399, 177 A. 631, and cases cited. The form of expression used in some of our cases is there must be substantial evidence fairly and reasonably tending to support the Plaintiff's claim to make a case for the jury."

Referring to the testimony as set forth above, it will be seen that the verdict in favor of the Plaintiff was necessarily based on speculation that had the ski instructor been present Plaintiff would not have fallen, but there is a total absence of evidence as to what, if anything, Plaintiff was doing wrong, whether such unknown thing caused her fall and what the ski instructor could have done to prevent it. The Court allowed the jury to indulge in an impermissible double inference that Plaintiff fell because of some fault in her technique which could have been corrected in time to avoid the fall by the instructor had he been present. A double inference is speculation and conjecture upon which a verdict may not be based. Peterson, supra, 119 Vt. 452, 128 A.2d 672.

D. Question of Law

It is the Defendant's position that there was no evidence to show causation in fact, or if any evidence could be found it was so illusory as to allow the jury to speculate. Such a question is a question of law and subject to review. O'Brien vs. Dewey, 120 Vt. 340, 347, 143 A.2d 130, 134 (1958);

McDonald vs. Montgomery Ward, 121 Vt. 221, 229, 154 A.2d 469,  
475 (Verdict for Plaintiff reversed for lack of evidence.)

II. THE PLAINTIFF IS BARRED BY ASSUMPTION OF  
THE RISK.

In Painter vs. Nichols, 118 Vt. 206, 310, 108 A.2d 384, 386 (1954), the Court found assumption of the risk as a matter of law. The Plaintiff there was loading logs, The Plaintiff knew or should have known that one of the skids made of boards was unsteady having placed the skid in position himself. The Plaintiff was injured when the skid turned and threw him. The Court said:

"There is a distinction between the doctrines of contributory negligence and assumption of risk, since there may be a voluntary assumption of the risk of a known danger that will bar one from recovering for injury even though in the exercise of due care. If one knowing and comprehending the danger, voluntarily exposes himself to it, even though not negligent in so doing, he is deemed to have assumed the risk and is

precluded from recovery for an injury resulting therefrom. *Bouchard v. Sicard*, 113 Vt. 429, 431, 35 A.2d 439, and cases cited. The same rule applies when the injured person is charged with knowledge of the danger."

In *Wright vs. Mt. Mansfield Lift*, 96 F.Supp. 786, 790-92 (D.Vt., 1951), a skier claimed to have hit a snow-covered stump of a tree on a ski trail. Verdict was directed for the Defendant. The Court said that skiing is a sport that requires an ability on the part of the skier to handle himself or herself under various circumstances of grade, boundary, mid-trail obstructions, corners and varied conditions of the snow. Secondly, it requires good judgment on the part of the skier and recognition of the existing circumstances and conditions. Only the skier knows his own ability to cope with a certain piece of trail. The doctrine of *volenti non fit injuria* applies. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary. The Court said at 96 F.Supp. 791:

"A different case would be here if the dangers inherent in the sport were obscure or unobserved \* \* \* Nothing happened to the Plaintiff except what common experience tells us may happen at any time as the consequence of a sudden fall. Many a speeder or horseman can rehearse a tale of equal woe."

The Plaintiff was injured at the top of the Snow Shed Area, not in the gondola area. (Tr. 51) It is evident from the foregoing statement of facts that the Plaintiff had fallen several times before and that all her lessons up until Friday were on the Snow Shed Area; she was therefore familiar with it and had been down the same slope before with her instructor. The Plaintiff was certainly aware that falling was part of the hazards of skiing. There is no claim of any defect in the terrain where the Plaintiff was injured and no defect in equipment relative to the injury has been proved. The injury therefore resulted solely from a risk inherent in the sport of skiing which the Plaintiff assumed.

CONCLUSION

The Verdict and Judgment should be set aside  
and Judgment entered for the Defendant for failure to prove  
causation and assumption of the risk.

SHERBURNE CORPORATION

By William E. King  
Ryan, Smith & Carbine  
Mead Building  
Rutland, Vermont

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing  
BRIEF OF DEFENDANT-APPELLANT on Delphine E. Plourde, the  
Plaintiff-Appellee, by mailing two copies of the same  
with postage prepaid, to her Attorneys of record, Bloomer  
& Bloomer, Esquires, 75 Merchants Row, Rutland, Vermont  
05701.

Dated at Rutland, in the District of Vermont, this  
6<sup>th</sup> day of May, 1974.

Robinson E. Keyes